No. 85-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF *AMICUS CURIAE* FOR THE VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONER

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Interest of the Amicus [1]

Vietnam Veterans of America ("VVA") is the largest national organization devoted exclusively to representing the needs and interests of veterans who served in the United States armed forces during the Vietnam era. It submits this brief amicus curiae in support of petitioner, to urge reversal of the decision of the Court of Military Appeals that drastically expanded the subject-matter jurisdiction of military courts beyond what is permitted by clear-cut precedents of this Court.

VVA's over 30,000 members, in 245 chapters throughout the United States, all served on active duty during the Vietnam

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[1] Letters from counsel for petitioner and respondent consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 36.2.

era. Many of them remain in the armed forces today, either on active duty or on disability or other retirement. All have been subject to the provisions of the Uniform Code of Military Justice ("UCMJ").

VVA was founded to improve the physical, legal, social and economic well-being of Vietnam veterans. It has long promoted legal efforts to assist veterans to obtain job training, health care and disability benefits.

In addition to representing veterans before the Board of Veterans Appeals, military Discharge Review Boards and the boards for the Correction of Military Records, VVA has participated in litigation to assist veterans on many issues. It has been particularly active in the recently-settled litigation over the toxic defoliant Agent Orange. It recently appeared as amicus

curiae in this Court in Attorney General of the State of New York v. Soto-Lopez, dkt. no. 84-1803, -- U.S. --, 54 U.S.L.W. 4661 (June 17, 1986) and Walters v. National Association of Radiation Survivors, -- U.S. -- , 105 S. Ct. 3180 (1985). It has also appeared as amicus curiae in the United States Court of Military Appeals, most recently in United States v. Yslava, dkt. no. 50,410/AR, -- M.J. -- (sub judice), a case involving the exercise of unlawful command influence over courts-martial.

Because this case involves the possible extension of the military justice system to cases that the Court of Military Appeals has heretofore held were not service-connected, VVA has a strong interest in participating. Many of VVA's members have first-hand experience of the military justice

system, as court members, counsel or defendants.

VVA believes that this Court was correct when it recognized in O'Callahan, and reaffirmed in Relford, that the justification for a system of specialized military criminal courts, independent of Article III of the Constitution and proceeding by practices different from those in civilian courts, and "in general less favorable to defendants . . . ," O'Callahan v. Parker, 395 U.S. 258, 265 (1969) "rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." Id., 395 U.S. at 265. VVA therefore believes that the decision below expanding jurisdiction of these specialized courts to an area beyond those special needs should be reversed.

Summary of Argument

This Court has long recognized that a separate system of military criminal courts rests upon the need for swift maintenance of discipline, for expertise in adjudicating peculiarly military crimes, and for jurisdiction where civilian courts are unavailable. At the same time, this Court has emphasized that courts-martial traditionally provide a "rough form of justice," Reid v. Covert, 354 U.S. 1, 35 (1957), often to the detriment of the accused, and are generally unqualified to deal with subtle questions of Constitutional law. The procedural and substantive short-cuts in military trials range from the commanding officer's discretion in selecting

the Court's personnel, through the limited avenues of appeal available to a defendant.

Recognizing these shortcomings, this Court has limited court-martial jurisdiction to those cases that involve the interests the military justice system was created to serve. This case involves none of those interests. It does not involve a peculiarly military-type crime. It does not pose a threat to the security of any military base. It did not require -- and did not receive -- swift adjudication in the military system. It involves none of the special considerations that historically justify the assertion of military jurisdiction and the consequent abridgement of a defendant's rights. The fortuity that a victim is the child of a service-member cannot provide the ground for subject-matter jurisdiction, and there is no reason to believe that

trial by court-martial serves the interests of protecting victims.

The decision below vastly increases the class of offenses that may be tried by military courts. In doing so, it puts the military into potential conflict with state authorities, without in any way benefitting victims. It provides no logical and coherent standards for military courts to resolve the constitutional issue of service-connection. The standards it does propose would permit military courts to arrogate to themselves the power to try crimes they deem to reflect adversely upon the military. It would abandon the clear, unanimous guidelines of Relford v. Commandant, 401 U.S. 355 (1971), and, ironically, revive the criticism that O'Callahan provided insufficient guidance for military courts.

For these reasons, the order of the trial judge, dismissing the Alaska offenses for lack of subject matter jurisdiction, was correct, and the decision of the Court of Military Appeals should be reversed.

Statement of Facts

For purposes of constitutional analysis, the relevant facts are easily identifiable and are not in dispute. Analyzed in accordance with the factors identified unanimously in Relford, they are:

1. The defendant was properly away from his duty station.

2. The offense occurred in a private home in the civilian community, eleven miles from any military facility.

3. The offense occurred in peacetime, within the territorial limits of the United States.

4. The offense bore no relation to the defendant's military duties.

5. The victims were not in the service, and were not engaged in the performance of any military duties at any time.

6. The civilian courts had jurisdiction over the offense, were fully functioning, and had tried other servicemen for the same offenses.

7. There was no relation between the offense and any military property.

8. There was no threat to the security of any military base -- indeed, there was no base to threaten.

9. The offenses were discovered months after the defendant and the victims left Alaska.

A general court-martial was convened on Governors Island, New York, three thousand miles from the vicinage of the offenses at issue. On defendant's motion to dismiss the Alaska charges for lack of subject-matter jurisdiction, the Military Judge, an experienced officer with years of operational service, including command of

a ship in Vietnam, did precisely what a reading of O'Callahan and Relford required him to do -- he analyzed the case in terms of the factors clearly identified by this Court. Doing so, he concluded that "what little if any distinct military interest there may be can be adequately vindicated in civilian courts." Pet. App. 61a.

The court below acknowledged that "A military judge's factfinding power under Article 62 cannot be superseded by a Court of Military Review," 21 M.J. at 254. Nevertheless, responding to the prosecution's plea to adopt a more "flexible" standard than that of O'Callahan and Relford, it reversed the Military Judge. In a dramatic and acknowledged about-face from their court's own precedents[2], the two judges

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[2] "Admittedly, our precedents involving off-base sex offenses against civilian dependents of military personnel would

constituting the Court of Military Appeals chose to depart from the Relford criteria, and returned the case for trial by court-martial, at which Petty Officer Solorio was convicted of the charges at issue.

Argument

I

THE MILITARY JUSTICE SYSTEM RESTS ON THE SPECIAL NEEDS OF THE MILITARY AND MILITARY TRIALS ARE RESTRICTED TO JURISDICTION RELATED TO THOSE NEEDS

It is not disputed that maintaining a separate system of criminal courts for the military serves a valuable, but limited, purpose.

> That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts

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point to a different conclusion." 21 M.J. at 254.

and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, e.g., Burns v. Wilson, 346 US 137, 97 L Ed 1508, 73 S Ct 1045, but in examining the reach of their jurisdiction, it has recognized that

> "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. . . .
>
> "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'" Toth v. Quarles, 350 US 11, 22-23, 100 L

Ed 8, 17, 76 S Ct 1 [quoting Anderson v. Dunn, 6 Wheat. (19 U.S.) 204, 230-31 (1821)].

O'Callahan v. Parker, 395 U.S. at 265 (emphasis in original).

Courts and experienced commentators have traditionally identified three grounds for maintaining a separate system of courts for criminal cases in the military: necessity, expertise and discipline. See R. Everett [now Chief Judge of the Court of Military Appeals, and author of the opinion below], Military Justice in the Armed Forces of the United States 4-7 (1956), quoted in H. Moyer, Justice and the Military (1972) at 13.[3]

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[3] Military authorities agree: "Unless military justice is oriented to a military task of instilling discipline within a military command, then military justice has no reason for being." [Brig. Gen.] D. Faw, "Why Military Justice?" 45 Off the Record (published by the Office of the Navy Judge Advocate General) (encl. 7)

A respected authority concludes:

> The basic reasons for the existence of a separate system of military justice may be summarized as (1) the need for swift and summary machinery for the maintenance of discipline; (2) the fact that the adjudication of military crimes may require military expertise by the court; and (3) the fact that the armed forces may be stationed abroad, outside the jurisdiction of their country's civil courts.

J. Bishop, "Military Law," 10 Int'l Ency. of the Social Sciences 312 (1968).

This Court, too, has concluded that "Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining

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(1970), quoted in Moyer, op. cit. at 15. "Naval justice must always be administered with its primary purpose in view -- the efficient functioning of the Navy." Naval Justice, NAVPERS 16199 (1945), quoted in Moyer, op. cit. at 18.

obedience and fighting fitness in the ranks." Reid v. Covert, 354 U.S. 1, 36-37 (1957).

Understood in this light, courts-martial serve valid purposes in adjudicating cases peculiar to the military, such as unauthorized absence, desertion, disrespect to superiors and disobedience of orders. In addition, where there is a need for summary maintenance of discipline; or where resources are limited, as in combat zones or where lawyers are unavailable; or where civilian tribunals are without jurisdiction; or where the security of a base is threatened, it is justifiable to forego the procedures that have evolved in civilian courts into standards of due process of law.

While these reasons justify the existence of courts-martial, "[M]ilitary tribunals have not been and probably never can be constituted in such a way that they

can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." Toth v. Quarles, 350 U.S. 11, 17 (1955)[4]. "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." O'Callahan v. Parker, 395 U.S. at 265. The system designed for the special purposes of military justice consistently comes up short when judged by customary standards of substantive and procedural fairness.

These weaknesses and short-cuts pervade the system, ranging from the unavailability of bail and the absence of a right to trial in the vicinage, through the commanding

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[4] Lest the Court believe that developments since Toth affect its vitality, it should note that the two defects of courts-martial emphasized in Toth -- lack of judicial tenure, and trial by hand-picked court members -- remain unchanged since then.

officer's discretion in hand-picking court personnel, to the limited avenues of appeal available to a defendant. While this is not the place for a detailed analysis of the Uniform Code of Military Justice, some salient examples are revealing:

Personnel: Participants in a court-martial are selected by the convening authority, who is usually also the officer who decided to bring charges in the first instance.

The military judge picked to preside enjoys absolutely no term of office. He may be removed at the conclusion of the trial, or re-appointed to serve again.[5]

Court members, the military equivalent of jurors, are hand-picked by the convening

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[5] See Toth v. Quarles, 350 U.S. 11 (1955); Fidell, "Judicial Tenure Under the Uniform Code of Military Justice," 31 Fed. Bar News & J. 327 (1984).

authority on a case-by-case basis -- a system that has been analogized to having the jury picked by the sheriff's office. Parisi v. Davidson, 405 U.S. 34, 53 n.5 (1972) (citing testimony at House of Representatives hearings on the Uniform Code of Military Justice) (Douglas, J., concurring).

Courts as small as three hand-picked members are authorized for special courts-martial, and as small as five for general courts-martial. Their verdicts need not be unanimous except to sentence a service-member to death.

Trial by peers is not possible, because enlisted personnel -- the vast majority of those tried by court-martial -- can request only that one-third of the Court consist of enlisted personnel, and even those must

be senior in rank to the defendant.[6] Moreover, as the Justice Department has recognized (in arguing to uphold the death penalty under the UCMJ), court members customarily serve at other times in prosecutorial roles in which they are themselves responsible for enforcing discipline[7].

Counsel in special courts-martial are also hand-picked, and are, like court members, subject to their commanding officers' powers of persuasion and leadership, including the prerogatives of assigning duties, issuing or withholding promotion, or recommending transfer or separation from the service. Where lawyers are unavailable, a special court-martial may proceed without them.[8]

Venue: A service-member does not enjoy the Sixth Amendment right to trial in the State and district in which the crime is committed.

Notice of Charges: A service-member may be tried by special court-martial on three days' notice, and by general court-martial on five days' notice.[9]

Punishment: Courts-martial are no mere misdemeanor courts. The UCMJ authorizes a sentence of death for well over a dozen

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6 Article 25, UCMJ, 10 U.S.C. §825.

7 "Military officers not only sit regularly as members of courts-martial; they act as convening authorities, summary courts-martial and investigating officers and, when in command, they impose non-judicial punishment." In other words, they are experienced as prosecutors. Brief of the United States Department of Justice, as amicus curiae on behalf of the United States Army in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), at 25.

8 Article 27(c), UCMJ, 10 U.S.C. §827(c). While the most blatant examples of retaliation are prohibited by Article 37, UCMJ, 10 U.S.C. §837, there has been no change in the statute since the pervasiveness of command influence was noted in O'Callahan, 395 U.S. at 264-65.

9 Article 35, UCMJ, 10 U.S.C. §835.

offenses, including such uncommon crimes as improper use of a countersign[10] and forcing a safeguard.[11] Some, like murder and rape, have no special military content.[12]

Several forms of less severe punishment, including fatigue duties for 45 days, and confinement on bread and water, are autho-

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[10] Article 100, UCMJ, 10 U.S.C. §900.

[11] Article 102, UCMJ, 10 U.S.C. §912. See also articles 82 (solicitation), 85 and 88 (desertion, assault or disobedience in time of war), 94 (failure to suppress or report a mutiny), 99 (cowardly conduct), 110 (willfully hazarding a vessel), and 113 (misbehavior of sentinel in time of war).

[12] The death-penalty procedures of the UCMJ were overturned by the Court of Military Appeals in 1983. United States v. Matthews, 16 M.J. 354. The President has since attempted to remedy these procedural defects by executive order. Rules for Courts-Martial 1104, Manual for Courts-Martial (1984). No court since Furman v. Georgia has had occasion to rule on the Constitutionality of the UCMJ's death penalties for offenses other than murder, though the Court of Military Appeals in Matthews declined to apply Coker v. Georgia, 433 U.S. 584 (1977), to invalidate the military's death penalty for rape.

rized by the UCMJ without trial and without affording the accused the assistance of counsel.

Appeals: The defendant may not appeal to any court a conviction resulting in a sentence less severe than confinement at hard labor for one year, or a punitive discharge.[13] As a result, the majority of court-martial convictions are not subject to direct review in any court of law.[14]

The prosecution, on the other hand, may take interlocutory appeals even from evidentiary rulings, and such appeals have priority over all other proceedings in the Courts of Military Review.[15]

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[13] Article 66, UCMJ, 10 U.S.C. §866.

[14] See Fidell, "Military Rights of Appeal," 8 Dist. Law. #6, 42 (Jul. - Aug., 1984).

[15] Article 62, UCMJ, 10 U.S.C. §862.

There is thus more at stake in the issue of service connection than the mere choice of a convenient forum. Military courts exist for legitimate, but special, purposes. This Court has consistently recognized as much, whether upholding court-martial authority as in Parker v. Levy and Relford v. Commandant, or restricting it as in Toth v. Quarles and O'Callahan v. Parker. Any analysis of subject matter jurisdiction must begin with those purposes in mind, and must determine whether those purposes justify the limitations on defendants' rights and the departure from traditional concepts of fairness and justice inherent in trial by a military court. Because no such special interests are served in this case, as we now show, the decision of the Court below should be reversed.

II

THIS CASE DOES NOT AFFECT THE SPECIAL NEEDS OF THE MILITARY

Because "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and more importantly, acts as a deprivation of the right to jury trial and of other treasured constitutional protections," Reid v. Covert, 354 U.S. 1, 21 (1957), this Court has consistently resisted attempts to expand the jurisdiction of courts-martial, and has limited the powers of military tribunals to "the least power adequate to the end proposed." Toth v. Quarles, 350 U.S. 11, 23 (1955).

On the facts of this case, there can be little doubt that the Court of Military Appeals' decision to extend court-martial jurisdiction is an aberration.

It is helpful for this analysis to recall clearly what this case is not. It is not a case arising in time of war, or in a combat zone. It does not arise overseas. It does not involve a military crime with no civilian counterpart. It is not a case that civilian courts are powerless to prosecute. It poses no threat to the security of any military base. Because the facts were not discovered until long after all the parties were transferred, it did not affect the morale or discipline of a military office, or even its reputation in the civilian community. It does not involve a victim performing a military duty. It bears no relation to any military property. It does not require any military expertise. In short, it involves no special military consideration of the type that historically justifies the assertion of military juris-

diction and its concomitant lessening of the defendant's rights and protections.

In response to these undisputed facts, the Court of Military Appeals relied upon a single fortuity: that the fathers of the victims were servicemen. But, while that Court properly noted the identity of the victims, it mistook the legal significance of that factor under O'Callahan and Relford.

Of the factors identified by this Court as significant to a determination of service-connection, only one concerns the identity of the victim, and that relates not to who the victim was, but to what he or she was doing. What is significant is not whether the victim was in the service, but whether the victim was engaged in the performance of a military duty. Relford v. Commandant, 401 U.S. at 365. That distinction is crucial, and is entirely con-

sistent with the other Relford factors. Like them, it is designed to distinguish those crimes that interfere with a military mission or military security from those that do not. Only the former may be service-connected.

Until this case, the Court of Military Appeals itself recognized and adhered to this distinction, holding that service-connection could not rest solely on the victim's status as a military dependent. United States v. McGonigal, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). See Fleiner v. Koch, 19 U.S.C.M.A. 630 (1969).

Thus, under clear guidelines from both this Court and the Court of Military Appeals, there could be no finding of

service-connection based solely on a victim's status as a service-member. Even if a service-member were engaged in the performance of a military duty at the time of a crime, that would satisfy only one of the Relford factors, and would be only the beginning of the inquiry, not the end.

Here, the weight of the various Relford factors is not in issue, and no balancing of those factors is required. The victims were not service-members. There can be no conceivable claim that they were engaged in any military mission, or that the offenses interfered with their military duties. The military judge, understanding and applying the unanimous standards of this Court in Relford, recognized as much. Only by misconstruing one of the Relford factors, and then elevating its importance over all the other criteria established by this Court,

could the Court of Military Appeals reverse its own precedents and find sufficient service-connection to subject Petty Officer Solorio to trial by a military court.

It is no answer to say, as the Court below said, that society in recent years has shown increasing solicitude for victims of crime. That development is not peculiar to the military, and there is absolutely no reason to believe that military courts will protect victims better than will civilian courts.

Moreover, military courts, which have no civil jurisdiction[16] and no experience

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16 "The jurisdiction of courts-martial is entirely penal or disciplinary." Rule 201, Manual for Courts-Martial (1984). The "Discussion" under this rule provides: "A court-martial has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property."

in domestic relations matters -- which remain the responsibility of the appropriate civilian courts -- may be singularly inept to accommodate the needs of juvenile victims of crime. They have no experience with juveniles. They have no probation or social service arm. They have a limited range of available punishments. With no provisions for compelling restitution, awarding damages or requiring community service, or for imposing or supervising probation, they are without the tools becoming increasingly familiar in civilian victim protection programs. Sentencing a defendant to confinement at hard labor or on bread and water, while perhaps satisfying in a sense of arcane retribution, may provide little tangible support for a victim.

In sum, this case involves none of the facts that Relford identified as supporting

service-connection, and none of the traditional grounds for exercising court-martial jurisdiction. There is neither need nor power to try cases like it in military courts.

III

THE DECISION BELOW RAISES PROBLEMS OF FEDERALISM AND PROVIDES NO LOGICAL AND VALID STANDARDS FOR DETERMINING SUBJECT-MATTER JURISDICTION

The Court of Military Appeals denies it is "trying to rewrite the Supreme Court's opinion in O'Callahan," 21 M.J. at 254,[17] saying instead it was applying that case to "conditions as they now exist." Id. The foundations on which O'Callahan and Relford rest, however, have not changed

[17] Cf., R. Everett, "O'Callahan v. Parker - Milestone or Millstone in Military Justice?" 1969 Duke L.J. 853, 896 (1969), where the author wrote, "[I]t can be readily perceived that this writer does not agree with the approach of the majority in O'Callahan v. Parker."

since they were written. Military courts still derive their authority from the Congressional power to "make rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, §8, cl. 14. The substantive and procedural short-cuts of courts-martial, noted by this Court since at least Toth v. Quarles, and the concept of civilian primacy, which reaches back to the foundation of the Republic, see Ex Parte Milligan, 4 Wall. (71 U.S.) 2 (1870), remain unchanged. The preference for resolution of judicial issues by Article III courts has, if anything, increased. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).[18]

[18] Discussing court-martial jurisdiction, the Court there noted, "[T]his Court has been alert to ensure that Congress does not exceed the Constitutional bounds and bring within the jurisdiction of the

The only "new item" to which the Court below can point is the "increase in the concern for victims of crime." We have already discussed, in Point II, why there is no reason to believe that military courts are peculiarly sensitive to the concerns of victims, or are better equipped to accommodate their needs. Indeed, to the extent there exists in the civilian community a perception that the military will "take care of its own," bringing civilian victims into a military forum for a case to be tried by military rules may hardly demonstrate fairness to the victim.

For the moment, however, we examine the consequences of the Court of Military Appeals' new approach resting on the status of the victim. What is the rule of the

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military courts matters beyond that jurisdiction, and properly within the realm of 'judicial power.'" 458 U.S. at 66, n.17.

decision below, and what does it mean for this country's system of criminal justice?

To begin with, by sweeping millions of dependents into an Article I court system, the decision vastly increases the class of victims, offenses against whom could give rise to trial by court- martial. Moreover, it takes those cases, not out of the federal judicial branch, but from the states, raising troubling problems of federalism. By increasing the jurisdiction of courts-martial over off-base civilian-type offenses, the decision below puts the military into potential conflict with state civilian authorities, who might understandably expect to have jurisdiction to try civilian-type crimes in their own communities. Where the courts that routinely try such cases are open and available, how is the proper forum to be selected?

To be sure, a service-member could be tried by both the military and state civilian courts without offending the letter of the double jeopardy clause, but that hardly seems a desirable solution, and it would not satisfy the concern for minimizing the burdens on victims expressed by the Court below.

To avoid that problem, the military and the fifty states could negotiate concordats similar to the Status of Forces Agreements the United States enters with foreign countries, spelling out which offenses will be tried by which courts. One may question the desirability of requiring the states to negotiate such treaties, which would no doubt leave the subject-matter jurisdiction of courts-martial a crazy quilt varying from state to state.

The approach of the Court below has

little to recommend it in the way of logic, consistency, or certainty of outcome. A purely victim-based military jurisdiction would run afoul of established Constitutional principles. The same crimes, committed in the same places, against the same victims, do not "aris[e] in the land or naval forces" if committed by civilians or dependents, over whom there is no subject-matter jurisdiction even if the crimes were committed overseas in a place where civilian courts were not functioning. Toth v. Quarles, 350 U.S. 11 (1955), Reid v. Covert, 354 U.S. 1 (1957).

To avoid the teaching of those cases, the Government argued below, and in its opposition to the petition for certiorari, that this case fell within the traditional grounds for court-martial jurisdiction because the crime threatened the security

of a military base. Explaining how this could possibly be when there was no base to threaten, the Government argued that, "because there is no military base in Alaska for Coast Guard personnel or their families...." "...it is reasonable to treat offenses committed against Coast Guard servicemen and their dependents in Juneau as if they were committed on a military base." Op. at 13. The Government argues further that, because there is no base, it is "immaterial" where the offenses occurred. Id. We confess our inability to respond to this argument that jurisdiction rests on the threat to base security because there is no base.

A final rationale offered by the Court below is the elusive standard of "impact" on the emotions or morale of the military community caused by disgust for or

disapproval of a defendant's acts. Such a standard could apply equally to virtually any conduct of a service-member, and it is far too vague a test for determining criminal jurisdiction. Locigally, it could extend court-martial jurisdiction over off-base civilian-type offenses against relatives, friends and neighbors of service-members, as well as over any offense against anyone, committed anywhere, that received sufficient publicity to direct adverse attention to the military. There is no justification for such a rule that anything that, in its own view, reflects adversely on the military, can be tried by a military tribunal -- at least not in this democracy.

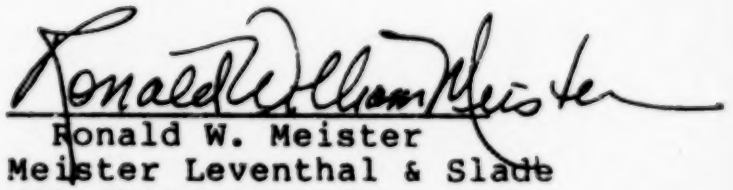
We are left, then, without a satisfactory rule in the decision below. What remains -- if the opinion is to be read as something other than an impermissible

attempt to overrule O'Callahan -- is the vague appeal to the totality of changed circumstances since O'Callahan and Relford, of which the Court can identify only the increased concern for victims of crime. But a retreat to such a standardless approach, with each case to be decided ad hoc, in a system that is insensitive to the subtleties of Constitutional law, has no expertise in deciding such issues, and is insulated in large measure from judicial review, would be an abandonment of responsibility to lend clarity to the law. Ironically, it would also revive much of the early criticism that O'Callahan provided insufficient guidance for military courts. Relford unanimously addressed and remedied that concern, 401 U.S. at 357, 370, and provided guidelines that, properly applied, require reversal of the decision below.

Conclusion

The decision of the Court of Military Appeals should be reversed.

Respectfully submitted,



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